No. 84-861

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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43 pp

QUESTION PRESENTED

Whether the National Labor Relations Board correctly concluded that collectively bargained rules governing the use of containers in the shipping industry, although having a valid work preservation objective in other aspects, lack such a valid work preservation objective in their application to certain specific but widespread practices of motor carriers and warehouses and therefore, to that extent, constitute unlawful secondary activity under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B) and 158(e).

PARTIES TO THE PROCEEDING

The decision of the court of appeals was issued in four consolidated cases seeking review or enforcement of decisions of the National Labor Relations Board. The International Longshoremen's Association, AFL-CIO (ILA), appeared as petitioner in one of those cases, intervenor in another, and respondent in a third. Additional respondents were the ILA Hampton Roads District Council; the ILA Atlantic Coast District Council; the ILA District Council, Baltimore, Maryland; ILA Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624 1680, 1736, 1783, 1784, 1819, 1840, 1922, and 1970, AFL-CIO; the Hampton Roads Shipping Association; Southeast Florida Employers Port Association; Coordinated Caribbean Transport, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company; and Marine Terminals, Inc. The American Trucking Association, Inc., Tidewater Motor Truck Association, the New York Shipping Association, and the Council of North Atlantic Shipping Associations appeared as petitioners and intervenors below. The International Association of NVOCCs; Florida Custom Brokers and Forwarders Association, Inc.; Twin Express, Inc.; and International Container Express, Inc., were petitioners below. Houff Transfer, Inc.; the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America; the American Warehousemen's Association; and San Juan Freight Forwarders, Inc., were intervenors below. Under Rule 19.6 of the Rules of this Court, all of these parties are respondents in this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a)[1] is reported at 734 F.2d 966. The decision and order of the National Labor Relations Board (Pet. App. 35a-64a) and the decision of the administrative law judge (Pet. App. 65a-258a) are reported at 266 N.L.R.B. 230.

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[1] "Pet. App." refers to the appendix filed jointly by the petitioners in Nos. 84-677, 84-686, 84-691, and 84-696.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1984. A petition for rehearing was denied on July 31, 1984 (Pet. App. 31a-34a). On October 19, 1984, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including November 28, 1984. The petition was filed on that date and granted on January 21, 1985 (J.A. 260). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(b) of the National Labor Relations Act, 29 U.S.C. 158(b), provides in part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> > (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing * * *.

Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), provides in part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforc[ea]ble and void * * *.

STATEMENT

This case concerns the Rules on Containers, which are part of collective bargaining agreements between the International Longshoremen's Association (ILA) and shipping industry employers. The Rules on Containers were adopted in response to a technological innovation in the shipping industry known as containerization and are designed to deal with the im-

pact of that innovation on longshoremen's work. In *NLRB* v. *ILA* (*ILA I*), 447 U.S. 490 (1980), this Court vacated two decisions [2] of the National Labor Relations Board that had concluded that the Rules on Containers and their enforcement constitute secondary activity prohibited by Sections 8(b)(4) and 8(e) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(4) and 158(e). On remand, the Board consolidated those two proceedings with seven other proceedings [3] concerning the Rules on Containers. The Board concluded that the Rules violate the NLRA in their applications to a widespread practice known as shortstopping and to certain traditional warehousing practices. The Board also concluded that the Rules are otherwise lawful. The court of appeals, disagreeing with the Board in part, held that the Rules are lawful in all respects.

A. The Factual Background

1. *Containerization and its Effect on Longshore Work*

Containerization is a technological innovation that permits individual pieces of cargo to be packed into a large, reuseable metal container that can be moved on and off an ocean vessel unopened. Containers range in length from 20 to 40 feet and are capable of holding upwards of 30,000 pounds of freight. Containers can be fixed to a truck chassis and transported unopened to and from the ocean pier, and they fit into the holds of specially designed vessels known

[2] *ILA (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. 525 (1978), remanded, 613 F.2d 890 (D.C. Cir. 1979); *ILA (Associated Transport, Inc.)*, 231 N.L.R.B. 351 (1977), remanded, 613 F.2d 890 (D.C. Cir. 1979).

[3] See pages 14-17 and notes 6-7, *infra*.

as containerships. Pet. App. 45a; *ILA I*, 447 U.S. at 494. The loading of containers, by whomever performed, is known in the industry as "stuffing"; the unloading of containers is known as "stripping." *ILA I*, 447 U.S. at 497. Containers that contain export cargo belonging to more than one shipper or import cargo destined for more than one consignee are known as LCL (less-than-container load) or LTL (less-than-trailer-load) containers. Containers that contain export cargo from only one shipper or import cargo destined for only one consignee are known as FSL (full shipper's load) containers. *Id.* at 496-497.

Before containerization, longshoremen employed by steamship companies performed the work of loading and unloading cargo from ships at the piers. In the Atlantic and Gulf ports concerned in this case, longshoremen are represented by the International Longshoremen's Association (ILA). The longshoremen handled export cargo by moving it from the tailgate of the delivery truck at the pier into the hold of the vessel, using forklifts and slings or hooks; they performed this work in reverse in unloading import cargo. The process of handling cargo on the pier included intermediate steps such as storage, sorting, checking, placing cargo on pallets, cargo repair, and carpentry. *ILA I*, 447 U.S. at 495; Pet. App. 4a-5a, 46a; J.A. 150-152, 195-197.

The growth of containerization greatly reduced the traditional loading and unloading work performed by longshoremen. Containers eliminated the need for piece-by-piece (or "break-bulk") cargo handling at the pier. *ILA I*, 447 U.S. at 495-496; Pet. App. 46a. Export containers were stuffed before they reached the pier; import containers were stripped after they left the pier. With respect to containerized cargo, it

remained only for longshoremen to take the containers on and off the vessel. Longshoremen continued to load and unload conventional cargo vessels in the traditional manner, to stuff containers with cargo that arrived at the pier piecemeal, and to strip containers of cargo scheduled to be picked up at the pier directly. Pet. App. 46a-47a; J.A. 53-54, 154-155, 195-197.

2. *Cargo Handling by Motor Carriers, Employees at Inland Warehouses, and Freight Consolidators, Before and After Containerization*

Shipping companies own or lease virtually all containers carried on ocean vessels. They furnish these containers principally to the shippers (or consignees) themselves and to three kinds of firms that serve as agents for the shippers and consignees: motor carriers, warehouses, and freight consolidators.

a. Motor carriers operate between inland points and the motor carrier's terminal in the pier area and also between the terminal and the pier (Pet. App. 46a, 54a, 132a-133a; J.A. 8-9, 25-27, 63-65). Before containerization, the motor carrier picked up import cargo break-bulk from the pier. Most commonly, the driver returned to the truck terminal in the pier area where the motor carrier's employees unloaded the trailer and then loaded the cargo into different trucks for delivery to the consignees (J.A. 8, 25-27, 63-65, 111-112). Even when the cargo was a full trailer load sent to a single consignee, it was usually taken to the terminal and reloaded for several reasons—to achieve proper weight distribution for a long haul run, to meet road safety standards, to allow sequential unloading, or to permit delivery of the cargo to diverse inland locations in accordance with the consignee's directions (Pet. App. 54a; J.A. 6-7, 25-27, 64, 90).

Motor carriers now haul empty and filled containers between the pier and their off-pier terminals, as well as to various other inland locations including warehouses and facilities of shippers and consignees. A carrier that handles import FSL containers—as many do exclusively or predominantly (J.A. 6, 10, 90-91, 127-128)—picks up a sealed FSL import container from the pier, hitches the container to the truck, and hauls it to the motor carrier's off-pier terminal (J.A. 27, 89-90, 113, 201, 216, 219-220, 224-225, 228). At the off-pier terminal, the carrier may treat the container in the same way that it previously treated a truckload of break-bulk cargo picked up from the pier and destined for a single consignee—it may either leave the container intact for delivery to the consignee or strip the container and reload the cargo into an over-the-road truck trailer. The practice of stripping FSL loads prior to delivery to a single consignee is known as "shortstopping." Pet. App. 27a, 54a-55a, 133a-134a; J.A. 6-7, 27-28, 91-93, 128-131, 205-207, 226-227.

Trucking companies shortstop containers for a variety of reasons arising from the requirements of surface transportation and at no extra charge to the consignee. Like trailer loads of break-bulk cargo picked up from the pier in the pre-container era, fully loaded containers may exceed state highway weight limitations or be overloaded, unbalanced, or otherwise unsuitable for hauling long distances (Pet. App. 55a, 134a; J.A. 9-10, 29, 117-118, 129-131, 206-210, 212-213, 222, 225-227). Containers also may be incompatible with conventional truck tractor equipment used for long-distance hauling. It is often more efficient to consolidate the contents of two 20-foot containers into one 45-foot truck trailer. And by using

their own trailers instead of containers, trucking companies can carry revenue-producing cargo on the return trip while at the same time avoiding maintenance costs and per diem charges on containers. Pet. App. 55a, 134a; J.A. 6, 27-28, 69, 92, 98, 115-116, 118, 207, 208-209, 216-217, 222, 229-230.

b. Inland warehouses store cargo for indefinite periods and distribute the cargo according to the owner's instructions; this enables the owner to meet the shifting or unexpected demands of its customers or the branches of its operation without having the cargo shipped to its central plant unnecessarily. Importers arrange with the warehouse to pick up cargo at the pier. Upon delivery of import cargo to the warehouse, warehouse employees, before containerization, unloaded the truck, sorted, segregated, and palletized the cargo, and placed it in designated storage areas. There it was stored until the consignee instructed the warehouse to distribute or deliver all or a portion of the cargo either to the consignee or to a designated customer or branch outlet of the consignee (Pet. App. 55a-56a; J.A. 96-97). In some cases, stored crates or cases of cargo were broken down and individual pieces of merchandise were delivered as directed by the consignee (J.A. 96-97).

Since containerization, warehouse employees, instead of stripping truck trailers filled with import cargo, have stripped containers that have been picked up from the pier and delivered unopened to the warehouse. The warehouse employees then perform the same tasks as before containerization—they sort, label, and place the cargo on pallets in order to store it in a designated location to await the owner's instructions on distribution (J.A. 15-16, 54-56, 67-69, 96-99).

Some warehouses also provide warehousing services for export cargo sent by a single shipper. For example, before containerization, one warehouse involved in this litigation stored small lots of cargo for later consolidation and shipment with additional cargo sent by the same shipper (Pet. App. 144a n.58; J.A. 98). Another warehouse picked up merchandise from a customer's manufacturer and assembled truckloads of cargo for each of the customer's overseas branch outlets (Pet. App. 144a n.58; J.A. 43-45). Since containerization, warehouses have continued to perform the same services, although now they combine designated stored cargo for shipment in FSL containers (Pet. App. 144a n.58; J.A. 15-16, 43-44, 53, 98-99). In connection with stuffing FSL export containers, warehouses also may perform specialized services for handling and packing cargo (Pet. App. 126a n.46; J.A. 105-109, 121-123).

c. Freight consolidators combine goods of various shippers in a single shipment at an off-pier terminal and deliver the consolidated shipment to the pier (*ILA I*, 447 U.S. at 496 n.8; Pet. App. 52a-53a, 124a n.43; J.A. 134). The extensive scale of off-pier stripping and stuffing—particularly the operations of freight consolidators known as non-vessel operating common carriers (NVOCCs)—has been encouraged by a rate structure under which shipping companies charge less for transporting a shipper's cargo when it has been combined with other shippers' cargo in a single container than they would charge for transporting that same cargo delivered to the pier in break-bulk fashion to be stuffed into a container at the pier (Pet. App. 127a-129a; J.A. 16-18, 77-78, 120, 134). In addition, shippers frequently seek to avoid having cargo handled in break-bulk fashion at the pier because, among other things, there is a

greater danger of pilferage and damage (see *ILA I*, 447 U.S. at 494; J.A. 56, 99, 121).

3. *The Rules on Containers*

Although the first ship specifically designed to handle containers appeared in 1957, and containers and their forerunners had appeared years earlier, it was not until the late 1960's that containerized cargo became a significant portion of the North Atlantic trade (*ILA I*, 447 U.S. at 497, n.11; Pet. App. 5a-9a, 96a, 98a, 100a & n.26; J.A. 66, 155, 161). The increased use of containers led the ILA to negotiate the initial version of the Rules on Containers as part of its 1968 collective bargaining agreement with the New York Shipping Association (NYSA), a multi-employer group of shipping and stevedoring companies operating in the port of New York (Pet. App. 9a-10a; J.A. 160-162). The agreement, which was settled only after a 57-day strike, applied only to LCL containers—those containing export cargo belonging to more than one shipper or import cargo destined for more than one consignee (Pet. App. 9a-10a, 99a-100a, 207a-211a; J.A. 162-163). The 1968 Rules provided that LCL containers could be stuffed or stripped within a 50-mile radius of the port only by longshoremen at the pier and assessed liquidated damages for each violation of this proscription. The 1968 Rules did not affect LCL containers stuffed or stripped beyond the 50-mile area and placed no restriction on FSL containers—those containing cargo owned by a single shipper or consignee. Pet. App. 9a-10a, 99a, 100a, 207a-211a. After another coast-wide strike, the rules were renewed in 1971 with only minor modifications and an increase to $1,000 in the liquidated damages assessed for each violation (Pet. App. 10a, 101a-102a, 212a-213a; J.A. 166-167).

The Rules were modified to their current form in 1973 by the so-called "Dublin agreement" between the ILA and the Council of North Atlantic Shipping Associations (CONASA), a multi-employer group of shipping associations (including NYSA) whose members are shipping and stevedoring companies operating in Atlantic Coast ports (Pet. App. 10a-11a, 102a-103a, 214a-215a; J.A. 149-150, 168-169). The Dublin agreement extended the Rules to FSL containers, specifying that they, too, must be stuffed and stripped within the 50-mile radius only by longshoremen at the pier. Exceptions were made for FSL containers stuffed or stripped by the beneficial owner of the cargo (a single shipper or a single consignee) or by a warehouse storing the cargo for more than 30 days. Pet. App. 10a-11a, 103a, 215a-216a.[4] The Dublin agreement maintained the $1,000 liquidated damages assessment for each violation of this proscription. In their current form, the Rules require shipping companies to deny containers to any facility that is operating in violation of the Rules. *Id.* at 10a-11a, 103a, 218a.[5]

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[4] Exceptions are also made for containers carrying personal household goods, mail, and the personal effects of military personnel, and for containers carrying cargo in the intercoastal trade (Pet. App. 225a-226a).

[5] For the purpose of this case, the Rules in their essentially final form appeared in the 1974-1977 agreement negotiated by ILA and CONASA, as clarified by a restatement pertaining to warehousing of goods issued in 1975 (Pet. App. 11a, 87a, 103a-104a, 106a n.29, 232a-234a; J.A. 240-242). The text of the rules reprinted in the appendix to the Court's opinion in *ILA I* (447 U.S. at 513-522) is the 1974-1977 version as amended by the 1975 clarifying statement, and it resembles in all significant respects the Rules as incorporated in the parties' agreement negotiated in 1980 (Pet. App. 103a-104a, 237a-238a).

The Dublin agreement modifications were designed to claim for the ILA the stuffing and stripping of FSL containers in connection with shortstopping and certain traditional warehousing practices (see Pet. App. 10a-11a, 102a-103a; J.A. 167-169, 184, 240-242). These are the applications of the Rules that are now in issue before this Court.

B. *ILA I*

Initially, however, the Board concluded that the Rules, and the ILA's effort to enforce them, violated Sections 8(b)(4)(B) and 8(e) in all respects. The Board reasoned that the objective of the Rules in all their applications was not to preserve the work of bargaining unit employees but to acquire work that had been performed by employees outside the bargaining unit. See *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 517 (1977); *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 644-645 (1967). In *ILA I*, this Court ruled that the Board's definition of the work at issue—" 'the off-pier stuffing and stripping of containers' " (447 U.S. at 506; citation omitted)—was "incorrect as a matter of law" (*id.* at 507) because the Board "focused on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping" (*ibid.*). The Court held that "the Board must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work" (*ibid.*).

The Court declined to address the question whether the Rules have a valid work preservation objective, however, because the Board has "not had an opportunity to consider th[is] question[] in relation to

a proper understanding of the work at issue." 447 U.S. at 511. The Court explained the issue as follows (*id.* at 510-511; footnote omitted):

> [The ILA and the shipping companies] assert that the stuffing and stripping reserved for the ILA by the Rules is functionally equivalent to their former work of handling break-bulk cargo at the pier. [The freight consolidators, truckers and warehouses], on the other hand, argue that containerization has worked such fundamental changes in the industry that the work formerly done at the pier by both longshoremen and employees of motor carriers has been completely eliminated.
>
> These questions are not appropriate for initial consideration by reviewing courts. They are properly raised before the Board, whose determinations are, of course, entitled to deference. * * * We emphasize that neither our decision nor that of the Court of Appeals implies that the result of the Board's reconsideration of this case is foreordained. Viewing the work allegedly to be preserved by the Rules from the proper perspective, the Board will be free to determine whether the Rules represent a lawful attempt to preserve traditional longshore work, or whether, instead, they are "tactically calculated to satisfy union objectives elsewhere," *National Woodwork*, 386 U.S., at 644.

The Court emphasized the limited nature of its ruling (447 U.S. at 511 n.26): "Our holding, we repeat, is that the Board's definition of the work in controversy was erroneous as a matter of law. The question whether the Rules may be sustained under a proper understanding of the work preservation doctrine must be answered first by the Board on remand."

C. The Board's Decision and Order on Remand

1. *The Cases Before the Board on Remand*

The Board consolidated the two cases remanded by *ILA I* with seven other cases involving the legality of the Rules. In several of these cases, the Board upheld applications of the Rules, finding that they had a valid work preservation objective; these rulings by the Board are not now in issue before this Court. In particular, in four cases the Board found that the Rules have a valid work preservation objective as applied to prohibit freight consolidators from stuffing and stripping containers within the 50-mile radius.[6]

Now at issue before this Court are the Board's findings that the Rules do not have a valid work preservation objective, and are therefore unlawful, as applied in three cases: as applied to prohibit motor carriers from shortstopping FSL containers (*Associated Transport*); as applied to prohibit a warehouse from stripping FSL containers as part of its traditional work of storing and distributing import goods (*Terminal Corp.*); and as applied to prohibit a warehouse from stuffing FSL containers as part of its traditional work of collecting, storing, and preparing for shipment export goods (*Beck Arabia, Ltd.*).[7]

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[6] *ILA (Consolidated Express, Inc.)*, 221 N.L.R.B. 956 (1975), enf'd, 537 F.2d 706 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977), judgment vacated Oct. 1, 1980 (2d Cir. 1980); *ILA (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. 525 (1978), remanded, 613 F.2d 890 (D.C. Cir. 1979), affirmed, *ILA I*, 447 U.S. 490 (1980); *ILA (Puerto Rico Marine Management, Inc.)*, 245 N.L.R.B. 1320 (1979); *ILA (American Trucking Ass'ns, Inc.)*, complaint dismissed, No. 22-CE-44 (Feb. 28, 1983); Pet. App. 60a, 173a-175a, 192a.

[7] The Board found no violation where the Rules were applied to prohibit warehouse employees within the 50-mile radius from stuffing FSL containers where this work was not integral to any specialized warehousing service. *ILA (The Terminal Corp)*, 250 N.L.R.B. 8 (1980), Pet. App. 143a, 180a-181a (stuffing FSL export containers).

The Board also found that the Rules have a valid work preservation objective as applied to prohibit warehouse employees from stripping containers within the 50-mile radius where the particular work in question had previously been performed by longshoremen at the pier. *Hill Creek Farms, Inc.*, No. 4-CC-1133 (Feb. 28, 1983), Pet. App. 142a-143a, 176a-179a (stripping of refrigerated containers previously performed by longshoremen at the pier). Finally, the Board found the application of the rules unlawful where they were "invoked in quest of organization of other employees * * * not represented by ILA." Pet. App. 186a; *Custom Brokers and Forwarders Ass'n*, No. 12-CE-30 (Feb. 28, 1983). Enforcement of the Board's order in this respect was not contested before the court of appeals and is not at issue here.

a. *Shortstopping* (Associated Transport)

As recounted in *ILA I*, Houff Transport, Inc. (Houff) and Associated Transport, Inc. (Associated) were common carriers that operated motor freight terminals within 50 miles of the Ports of Baltimore and Hampton Roads. *ILA I*, 447 U.S. at 501; *ILA (Associated Transport, Inc.)*, 231 N.L.R.B. 351, 358 (1977), remanded, 613 F.2d 890 (D.C. Cir. 1979), affirmed, 447 U.S. 490 (1980). In 1974, employees of Houff and Associated stripped FSL containers they had picked up at piers in the nearby ports and loaded the cargo into trailers for over-the-road transport to the consignees. Both Houff and Associated stripped the containers because they were clearly overweight. *ILA I*, 447 U.S. at 501; *Associated Transport*, 231 N.L.R.B. at 362; J.A. 28, 205-206, 221-222. The shipping companies that released the containers to Houff and Associated were subsequently assessed liquidated damages under the

Rules for each container, and when Houff and Associated refused to indemnify the companies for the fines, the companies cancelled the agreements under which Houff and Associated obtained the containers. *ILA I*, 447 U.S. at 501; *Associated Transport*, 231 N.L.R.B. at 362-363; J.A. 28, 183, 245-248.

b. *Stripping of FSL containers by warehouse employees integral to distribution and storage of imported merchandise for a single owner* (Terminal Corp.)

The Terminal Corporation is a bona fide warehouse within the meaning of the Rules operating within 50 miles of the Port of Baltimore. In 1978 and 1979, Terminal received FSL containers of firebrick from a German manufacturer as part of a continuing arrangement. According to the usual practice, German employees stuffed the containers, ILA labor in Baltimore unloaded them from the ship, and Terminal drivers attached the containers to tractors and drove them to the warehouse. Other Terminal employees then stripped the containers, separating out the firebrick already sold for distribution and storing the rest for future distribution pursuant to the instructions of the manufacturer. Stored firebrick was sometimes distributed in less than 30 days and sometimes held for more than 30 days, depending on the manufacturer's orders. *ILA* (*Terminal Corp.*), 250 N.L.R.B. 8, 10-11 (1980); Pet. App. 179a; J.A. 250-252.

In March 1979, agents of the ILA, its Atlantic Coast District, and two ILA locals induced members employed by a stevedoring contractor to engage in a temporary refusal to release containers of firebrick to Terminal because the shipping papers did not contain the 30-day warehousing language required by

the Rules. *ILA* (*Terminal Corp.*), 250 N.L.R.B. at 11; Pet. App. 179a-180a.

c. *Stuffing of FSL containers by warehouse employees integral to special services respecting goods for export by a single owner* (Beck Arabia, Ltd.)

Beck Arabia, Ltd., is engaged in various construction projects in Saudi Arabia; from its offices in Texas it orders a variety of items from a number of American suppliers for use in the Saudi projects. Under a continuing arrangement between Beck and Shipside Packing Company, a firm that maintains a general warehouse and packing operation within 50 miles of the Port of Baltimore, Beck's suppliers send the items to Shipside, which stores them temporarily until receiving orders from Beck to consolidate particular groups of items for shipment on specified vessels. Shipside employees then stuff FSL containers for delivery to the pier by contract motor carriers. In August 1978, an agent of an ILA local induced ILA members employed by a stevedoring company to refuse to load the containers onto a ship because the ILA regarded their stuffing by non-ILA labor to be a violation of the Rules. *ILA Local 953* (*Beck Arabia, Ltd.*), 245 N.L.R.B. 1325 (1979); Pet. App. 181a-182a.

2. *The Board's Decision and Order*

The administrative law judge concluded that the Rules were invalid insofar as they applied to shortstopping and container stripping and stuffing integral to traditional warehousing practices. The ALJ concluded that the Rules were valid in other respects. The ALJ described the practice of shortstopping as follows (Pet. App. 133a-134a; emphasis in original):

By virtue of this practice, FSL containers are stripped at truck stations and terminals within the geographic area covered by the Rules for a variety of reasons associated with the economics of *surface* transportation. * * * Over-the-road tractor-trailers are up to 45 feet in length, and therefore have a capacity exceeding that of the modern containers. Interstate carriers will upon occasion strip the smaller containers, consolidate the cargo they contain with other goods destined for the same area and load the consolidated cargo into a 45 foot tractor-trailer. In addition, many interstate carrier systems interchange trailers at inland points for use within a multi-state system. Containers have no utility within that system and if transported over the road, would have to be hauled empty back to the port area * * *. Short-stopping may also occur because containers may not have been loaded in a safe manner or in compliance with State laws regulating safety of operation on the highways. Other grounds for short-stopping include the fact that [a] motor carrier is required to pay *per diem* charges on containers, a practice which is wasteful while empty trailers sit idle and are subject to utilization without additional operating cost.

On the basis of these findings, the ALJ concluded that "the practice of short-stopping is rooted in traditional motor carrier transport cargo handling procedure, which is performed by motor carriers for their own benefit and convenience * * * [and] has no relevance to the marine leg of the intermodal network" (Pet. App. 134a). The ALJ explained that "[a]lthough skills utilized [in stripping containers in the course of shortstopping] are indistinct from those of deepsea longshoremen in the performance of

their traditional duties, it is work assumed for a different purpose, and in a different segment of the transportation industry. Shortstopping is simply a carrier oriented, as distinguished from consumer oriented service, and as such neither competes with marine cargo handling nor amounts to a subterfuge to oust longshoremen of their traditional work" (*id.* at 134a-135a).

The ALJ similarly determined that the Rules were unlawful as applied to traditional warehousing practices (Pet. App. 138a):

> [T]he public inland warehouse has always provided an intermediate freight distribution service whereby cargo could be stored for a term dictated by the owner's market demand.
>
> To this extent, warehousing practices did not change after containerization. Instead of stripping truck-trailers upon arrival at the warehouse docks, the container was stripped.

The ALJ upheld the Rules, however, insofar as they applied to freight consolidators, including both NVOCCs and warehouses that function not in their traditional role but as freight consolidators (Pet. App. 123a-132a, 139a-145a). The ALJ reasoned that "if consolidation in containers is to be performed within the port area, it just as conveniently could be performed on the pier by longshoremen" (*id.* at 131a). The ALJ accordingly concluded that insofar as the Rules claim the off-shore stripping and stuffing performed by NVOCCs within 50 miles of the port, they "constitute[] a rational effort to return to the piers, work diverted by inducements and * * * technology" (*id.* at 129a-130a).

The Board "agree[d] with the Administrative Law Judge's findings and conclusions" (Pet. App. 57a).

The Board explicitly defined "the work in dispute" as "the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective-bargaining relationship with the ILA" (*ibid.*). The Board noted that "no new work was created for consolidators after containerized shipping began" (*id.* at 59a). Instead, a "large part of the longshoremen's traditional work was diverted away from the pier to the consolidators" (*ibid.*). The Board accordingly concluded that "the ILA had a lawful work preservation objective in claiming this work under the Rules" (*ibid.*).

The Board modified the ALJ's rationale for concluding that the Rules were unlawful as applied to shortstopping and traditional warehousing functions, but it agreed with his conclusion (Pet. App. 59a):

> The Administrative Law Judge also found that no new work was created by containerization for trucking and warehousing employees. Further, in contrast to consolidation, no work was diverted away from the pier to the truckers and warehouses as a result of containerization, at least as to those shortstopping and traditional warehousing services involved where he found violations. Rather, after containerization, some of the traditional loading and unloading work of the longshoremen, which had historically been duplicated by trucking and warehousing employees, essentially was eliminated. While we agree with the Administrative Law Judge's conclusion that the ILA had an unlawful work acquisition objective in claiming this loading and unloading work * * *, we do not agree with his reliance on the fact that the work now done by the truckers and warehouses is work which was

> not created by containerization. Instead, we point to the fact that, because of the efficiency of the new technology, the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehouses, no longer exists as a step in the cargo-handling process. * * *

D. The Decision of the Court of Appeals

The court of appeals held that "the Rules are valid in all respects" (Pet. App. 4a). It accordingly sustained the Board's order insofar as it upheld the lawfulness of the Rules, but denied enforcement of the order insofar as it held unlawful the application of the Rules to shortstopping and certain warehousing practices.

The court held (Pet. App. 27a) that the Board erred as matter of law when it concluded that, because the Rules as applied to shortstopping and traditional warehousing practices "sought to preserve for the longshoremen work that had been rendered superfluous by the change in technology and not work that had been diverted to others," the Rules violated the Act in those applications. The court of appeals acknowledged that containerization had essentially not altered the truckers' work and had made the longshoremen's work unnecessary (*ibid.*):

> Prior to containerization, both the longshoremen and the truckers handled the break-bulk cargo as it moved from the ship to the consignee. * * * With containerization, the off-pier work of the shortstopping truckers remains essentially unchanged except that they unload cargo from containers instead of from motor trucks. And with containerization, of course, the work formerly performed by the longshoremen

had been rendered unnecessary because the container can be fastened to the chassis of a truck and transported intact to the trucking terminal or freight station.

Nonetheless, the court of appeals ruled that the Board's conclusion that the application of the Rules to shortstopping does not have a valid work preservation objective was erroneous for the following reason (Pet. App. 27a-28a; emphasis in original):

> [T]he Board conspicuously failed to ground this conclusion * * * in the only finding of fact that might support it: that the Rules, in preserving for ILA members the right to do this initial loading and unloading somehow deprive the truckers and warehousemen of *their* off-pier work by transferring all or some of it to longshoremen at the pier. Put another way, the Board hung the "work acquisition" tag on the Rules in these two instances without a finding that the longshoremen acquired anything. * * * [O]ne cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology; the longshoremen have acquired none of that work. Although the longshoremen's work in this process may well duplicate the off-pier work of truckers and warehousemen, calling this set of circumstances "work acquisition" strikes us as particularly inappropriate.[8]

[8] The court of appeals did not discuss in detail the application of the Rules to traditional warehousing practices but asserted that "the Board made the identical error of law with regard to both shortstopping and warehousing" (Pet. App. 27a n.8).

Three judges of the court of appeals voted to rehear the case en banc (Pet. App. 33a).

SUMMARY OF ARGUMENT

The Rules on Containers require shipping companies to cease doing business with persons that permit the stuffing or stripping of containers in violation of the Rules. Consequently, Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), if interpreted literally, would unquestionably make the Rules on Containers unlawful. This Court has held, however, that Section 8(e) permits agreements that have the purpose of preserving work traditionally performed by the contracting employees.

In *ILA I*, the Court explained that the question whether the Rules on Containers have a lawful work preservation objective depends on whether the Rules are "tailored * * * to the objective of preserving the essence of traditional work patterns" (447 U.S. at 510 n.24). The Court instructed the Board to resolve this issue by undertaking "a careful analysis of the traditional work patterns that the [Rules] are allegedly seeking to preserve" (*id.* at 507) in order to determine "whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation" (*id.* at 510).

The Board undertook the analysis of traditional work patterns mandated by this Court. The Board ruled that freight consolidators (who primarily assemble LCL containers) perform work that historically and functionally is indistinguishable from the traditional work of longshoremen; the Board accordingly upheld the application of the Rules to

freight consolidators, and that aspect of the Board's decision is not now in issue. But the Board also concluded that, historically and functionally, shortstopping is not an aspect of traditional longshore work but is instead integral to the movement of cargo by motor carrier. The unloading of FSL containers done in connection with shortstopping is undertaken for reasons related to motor transport, not longshore work, and has never been performed by longshoremen. The Board similarly concluded that stuffing and stripping of FSL containers done in connection with certain traditional warehousing functions is an aspect of the traditional work pattern of warehouse employees, not longshoremen.

The court of appeals did not quarrel with any of these determinations. Nor did the court suggest that the Board had not carried out the task specified by this Court in *ILA I*. Instead, the court of appeals overturned the Board's ruling, insofar as it invalidated the Rules, solely because the Board had not found that the application of the Rules to shortstopping and the warehousing practices would deprive other employees of their work.

The court of appeals' unsubstantiated conclusion that the Rules would not operate to deprive other employees of their work flies in the face of economic reality. But even if that conclusion were true, it is immaterial whether the Rules deprive other employees of their work. As the name of the work preservation doctrine itself suggests, and as the Court has emphasized in each of its decisions dealing with that doctrine—especially *ILA I*—the question is not whether the Rules deprive other employees of their work but whether the work claimed by the Rules is "traditional longshore work" (*ILA I*, 447 U.S. at

509). The Board concluded that shortstopping and stuffing and stripping of FSL containers in connection with certain warehousing activities are not traditional longshore work, and the court of appeals nowhere explained why these conclusions are unreasonable.

Moreover, the court of appeals failed to take account of the Board's explicit finding that certain break-bulk loading and unloading work formerly done by longshoremen in connection with FSL loads has been eliminated by containerization. Indeed, in the course of collective bargaining on the effects of containerization, the ILA did not attempt to claim work in connection with FSL loads until the Dublin modifications; then it specifically claimed the work done in connection with shortstopping and traditional warehousing functions. But the ILA was not free to attempt to compensate for the work that was eliminated by acquiring work that—as the Board reasonably determined—has not traditionally been performed by longshoremen.

ARGUMENT

THE COURT OF APPEALS ERRED IN OVERTURNING THE BOARD'S DETERMINATION THAT THE APPLICATION OF THE RULES TO SHORTSTOPPING AND CERTAIN TRADITIONAL WAREHOUSING PRACTICES CONSTITUTES UNLAWFUL SECONDARY ACTIVITY

1. By its terms, Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), prohibits employers and unions from agreeing that the employer will cease doing business with another person. See, *e.g.*, *NLRB* v. *Enterprise Association of Pipefitters*, 429 U.S. 507, 517 (1977). If Section 8(e) were interpreted liter-

ally, the Rules on Containers would unquestionably be unlawful: they require shipping companies not to supply containers to other persons, unless those persons permit the containers to be stuffed and stripped by employees represented by the ILA under the circumstances specified in the Rules. This Court has held, however, that Section 8(e) applies only to secondary activity, not to activity serving a legitimate primary purpose. See *ILA I*, 447 U.S. at 504; *Pipefitters*, 429 U.S. at 517; *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 620 635 (1967).[9]

"Among the primary purposes protected by the Act is 'the purpose of preserving for the contracting employees themselves work traditionally done by them.' " *ILA I*, 447 U.S. at 504, quoting *Pipefitters*, 429 U.S. at 517; see *National Woodwork*, 386 U.S. at 629. As the Court has explained, an agreement does not have a legitimate work preservation objective—and is instead unlawful under Section 8(e)—if its "object * * * [is] not to preserve, but to aggrandize, [a union's] own position and that of its members" (*Pipefitters*, 429 U.S. at 530 n.16). A union may not "seek[] to restrict by contract or boycott an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs." *National Woodwork*, 386 U.S. at 648 (Harlan, J., concurring); see *id.* at 630-631.

[9] The Court has arrived at this construction of Section 8(e) by interpreting it "*pari passu*" with Section 8(b)(4)(B) of the NLRA, 29 U.S.C. 158(b)(4)(B) (*National Woodwork*, 386 U.S. at 649 (Harlan, J., concurring)), which contains a proviso explicitly excepting "any primary strike or primary picketing" from its prohibitions. A union violates Section 8(b)(4)(B) if it applies pressure in an effort to enforce a provision of a collective bargaining agreement that violates Section 8(e).

Accordingly, as the Court explained in *ILA I*, the question in this case is whether the Rules on Containers are "tailored * * * to the objective of preserving the essence of traditional work patterns" (447 U.S. at 510 n.24) and thus "seek[] no more than to preserve the work of bargaining unit members" (*id.* at 507), or instead seek to "aggrandize" the ILA's position by "acquiring for its members work that had not previously been theirs." The Court remarked in *ILA I* that in its previous cases dealing with the work preservation doctrine—*National Woodwork* and *Pipefitters*—the task of determining the nature of traditional bargaining unit work was "relatively simple" (447 U.S. at 507). But "[t]his case presents a much more difficult problem" (*id.* at 509-510), because containerization—the innovation to which the Rules are addressed—has worked the "transformation of several interrelated industries [and] types of work" (*id.* at 507). In other words, in determining the lawfulness of the Rules the Board has been faced with the task of assessing the extent to which the Rules preserved "the essence of traditional work patterns" in a setting in which work patterns have been radically altered by containerization.

The Court in *ILA I* enjoined the Board to perform this task by conducting "a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve" (447 U.S. at 507) that focuses on the "historical and functional relationship between the retained work and traditional longshore work" (*id.* at 510). The Court in *ILA I* made it abundantly clear that the Board's resolution of this complex issue is entitled to substantial deference (see *id.* at 511 & n.26).

2. In determining the extent to which the Rules preserve "the essence of traditional work patterns," the Board distinguished between freight consolidation, on the one hand, and shortstopping and certain traditional warehousing practices, on the other. Specifically, as we have explained, the Board concluded that the Rules are lawful as applied to freight consolidation but are unlawful as applied to shortstopping and the traditional warehousing practices. The court of appeals refused to enforce the Board's order only insofar as it declared unlawful the application of the Rules; thus, only the Board's rulings with respect to shortstopping and the traditional warehousing practices are now before this Court. Nevertheless, we will discuss the Board's determination that the Rules are lawful as applied to freight consolidation in order to provide the larger context of the Board's rationale and demonstrate the reasonableness of its particular conclusions on the two limited questions at issue here.

a. Freight consolidators deal primarily with LCL containers—that is, containers holding cargo sent by more than one shipper. Before containerization, shippers delivered cargo in break-bulk to the pier, where longshoremen loaded it into the hold of a ship; now, break-bulk cargo may be delivered not to the pier but to the inland terminals of NVOCCs and other freight consolidators, who load it into containers that will be transferred into the holds of ships.

The Board concluded that the freight consolidators' work "is functionally equivalent to [the longshoremen's] former work of handling break-bulk cargo at the pier" (*ILA I*, 447 U.S. at 510; footnote omitted). The Board reasoned that "no new work was created for consolidators after containerized shipping began.

Rather, a large part of the longshoremen's traditional work was diverted away from the pier to the consolidators" by containerization and other factors (Pet. App. 59a). The Board accordingly agreed with the ALJ's determination that the Rules—insofar as they prohibit freight consolidators from stuffing containers within 50 miles of the pier and require that the stuffing be done by ILA labor at the pier instead—constitute "a rational attempt to claim only the work * * * which had previously been performed on the pier by longshoremen" (*id.* at 53a).

b. The Board also concluded, however, that stuffing and stripping done in connection with shortstopping of FSL containers and certain traditional warehousing functions in respect of FSL loads stand on a different footing from freight consolidation and are not fairly claimable by the ILA. Before containerization, cargo destined for a single consignee was unloaded in break-bulk from the ship and onto a truck, which was driven a short distance to the carrier's inland terminal near the pier. There—even though the truck load was destined for a single consignee—employees of the motor carrier frequently shortstopped it; that is, they unloaded the cargo and reloaded it, in order to achieve the proper weight distribution, to meet safety standards, to allow for sequential unloading, or to permit delivery to diverse locations in accordance with the consignee's directions.

Containerized cargo destined for a single consignee (an FSL container) is taken from the hold and attached directly to a truck chassis, thus eliminating the initial break-bulk handling by ILA labor at the pier. From that point on, the FSL container is treated in the same fashion as a truckload of cargo

destined for single consignee was treated before containerization. The container is driven to the motor carrier's pier area terminal, where it is shortstopped for the same reasons that pre-containerization truckloads were shortstopped.

After conducting its analysis of "traditional work patterns" and "the historical and functional relationship between [shortstopping] and traditional longshore work" (*ILA I*, 447 U.S. at 507, 510), the Board concluded that shortstopping is not traditional longshore work but is instead "rooted in traditional motor carrier transport cargo handling procedure" (Pet. App. 134a). Shortstopping has traditionally been done by the employees of motor carriers, and it is done for purposes wholly distinct from the traditional purposes of longshoremen's work—specifically, for purposes integrally connected to movement by motor carrier, such as the need to satisfy weight or balance requirements or to obtain the most efficient use of trucks and trailers. Longshoremen have never performed loading or unloading work for these purposes. The Board reasonably concluded that the longshoremen could not claim this work—which is "historical[ly] and functional[ly]" (*ILA I*, 447 U.S. at 510) related to the work of motor carriers' employees, not longshoremen—just because the work may physically resemble longshoremen's work and require some of the same skills. See Pet. App. 134a-137a.

The Board further explained that as a result of containerization, some of the longshoremen's work of unloading FSL loads "essentially was eliminated" (Pet. App. 59a). FSL containers can pass over the pier intact and enter the land transportation network without being unloaded either by longshoremen or by

employees performing work that is the functional equivalent of traditional longshore work. Indeed, in the first collective bargaining agreement that regulated the use of containers, the ILA did not seek to restrict the stripping and stuffing of FSL containers at all. When the ILA subsequently, in the Dublin modification, asserted a right to strip and stuff some FSL containers, it did so by claiming certain specific work—the stripping and stuffing done in connection with shortstopping and traditional warehousing practices—that are no part of a longshoreman's traditional work. As we have explained, under *ILA I* and this Court's other decisions defining the work preservation doctrine, a union is not engaged in valid work preservation when it attempts, as the ILA has here, to alter, rather than preserve, "traditional work patterns" (447 U.S. at 507; *id.* at 510 n.24).

c. The Board's analysis of the warehousing functions paralleled its analysis of shortstopping. Before containerization, when a truckload of cargo for a single consignee was delivered to a warehouse, warehouse employees unloaded the truck, sorted, segregated, and palletized the cargo, and placed it in designated storage areas. The cargo remained there until the consignee instructed the warehouse to distribute all or a portion either to the consignee or to a designated customer or branch outlet of the consignee.

Since containerization, warehouse employees have performed precisely the same tasks, except that now instead of unloading trucks that were loaded by longshoremen they strip FSL containers that were loaded at the point of origin and have been delivered unopened to the warehouse.[10] Under the Rules, this

[10] Some warehouses provide similar services for export cargo sent by a single shipper. Thus, prior to containeriza-

stripping, too, must be done at the pier by ILA labor. The Board concluded that this application of the Rules is unlawful because traditional longshore work has been eliminated with respect to FSL containers that are stripped or stuffed in connection with the traditional warehousing functions; and the stripping and stuffing work that remains is associated with the traditional work patterns of warehouse employees, not longshoremen. See Pet. App. 55a-56a, 58a-59a, 138a.[11]

3. In sum, the Board, on remand from *ILA I*, undertook precisely the inquiry specified by this Court and concluded that the stripping and stuffing done in connection with shortstopping and the warehousing practices—unlike that done by freight consolidators—is not historically and functionally associated with longshore work and is not part of the traditional work patterns of longshoremen. In view of the purposes of shortstopping and the warehousing practices and their traditional integral association with the functions not of longshoremen but of motor

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tion, these warehouses stored small lots of cargo for eventual consolidation and shipment to the pier with additional cargo sent by the same shipper. After containerization, these same services were performed by the warehouse by stuffing the accumulated cargo into a container with other cargo from the same shipper, which container could then be trucked to the pier and loaded onto the ship without further handling at the pier. See pages 9, 17, *supra*.

[11] In addition, if longshoremen were to begin to perform traditional warehousing functions, existing facilities would have to be modified; piers are not generally equipped to meet the demands for storage space and sorting capacity that a warehouse must fulfill. This further demonstrates the reasonableness of the Board's conclusion that stuffing and stripping done in connection with warehousing functions is not traditional longshore work.

carriers and warehouses, the Board's determination was plainly reasonable: the ILA was seeking "not to preserve, but to aggrandize, its own position" (*Pipefitters*, 429 U.S. at 530 n.16) by "acquiring for its members work that had not previously been theirs" (*National Woodwork*, 386 U.S. at 648 (Harlan, J., concurring)).

Indeed, the court of appeals, although it overturned these aspects of the Board's conclusions, does not appear to have disagreed with the Board's analysis of traditional work patterns and of the historical and functional nature of longshore work. On the contrary, the court appeared to recognize that the stuffing and stripping done in connection with shortstopping and the warehousing practices have traditionally been undertaken by the employees of motor carriers and warehouses, not by ILA labor. See Pet. App. 27a. Moreover, the court of appeals did not suggest that the Board violated the terms of this Court's mandate in *ILA I*. Instead, the court of appeals held that the Board "erred as a matter of law" (*ibid.*; footnote omitted) for a single specific reason that was not adumbrated by this Court's analysis in *ILA I*: the Rules are lawful, the court of appeals held, because they did not "deprive the truckers and warehousemen of *their* off-pier work" (Pet. App. 27a; emphasis in original).

Although the court of appeals did not fully explain why a finding that other employees were deprived of their work is a necessary predicate of concluding that the Rules are unlawful, the court appears to have reasoned that the Rules on Containers have a valid "work preservation" objective unless they have the effect of "acquiring" work for the longshoremen from other employees; the court then concluded that the

longshoremen cannot be said to have unlawfully "acquired" work unless they acquired it from the other employees, thereby leaving the others with less work. There are at least three errors in the court of appeals' reasoning.

First, there is no basis for the court of appeals' gloss on the "work preservation" doctrine; that doctrine does not refer to the extent to which others are deprived of work. As this Court remarked in a different context in *ILA I*, "[t]he effect of work preservation agreements on the employment opportunities of employees not represented by the union * * * is * * * irrelevant to the validity of the agreement" (447 U.S. at 507 n.22). This Court has never suggested that a union is entitled to engage in secondary activity in order to acquire new work that did not traditionally belong to its employees so long as it does not deprive other employees of their work. On the contrary, as the name of the work preservation doctrine suggests, and as the Court emphasized in *ILA I* itself, the question is whether the work claimed by the bargaining unit employees is sufficiently related to the work they have traditionally performed. "[T]o determine whether an agreement seeks no more than to preserve the work of bargaining unit members, the Board must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work" (*ILA I*, 447 U.S. at 507; footnote omitted). See *id.* at 510 & n.24 (The legality of the agreement "will depend on how closely the parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns."); *National Woodwork*, 386 U.S. at 646 (upholding Board determination that "the conduct of the Union * * * related solely to preserva-

tion of the traditional tasks of" bargaining unit employees); pages 26-27, *supra*.

Second, the court of appeals overlooked the fact that this Court in *ILA I* specifically contemplated that the Board, in assessing the validity of the Rules, might take into account that "containerization has worked such fundamental changes in the industry that the work formerly done at the pier by * * * longshoremen * * * has been completely eliminated." 447 U.S. at 510-511. As we have noted, the Board explicitly found, with respect to shortstopping and traditional warehousing practices, that the longshoremen's traditional work has been eliminated. See Pet. App. 59a-60a. The court of appeals itself recognized that because an import FSL container can be attached to a truck chassis and taken on the road to the owner, certain work previously done by longshoremen in connection with shipments destined for a single consignee—unloading the break-bulk cargo from the ship and placing it at the head of the pier for collection by a truck—has been eliminated (*id.* at 27a). The fact that the motor carrier hauling an FSL container might, for its own purposes, rearrange its truck loads, stripping the container in the process—that is, shortstopping—does not alter the fact that the longshoremen's work has been eliminated.

The court of appeals' analysis cannot be squared with this Court's statements about the elimination of work in *ILA I* and the Board's finding that certain work of the longshoremen has been eliminated. The point of the Court's statement in *ILA I* about the elimination of work is that if work has been "completely eliminated" (447 U.S. at 511) by technology, a union may not "preserve" that work by attempting to gain other work that did not traditionally belong to it. The Board found that the ILA's role in load-

ing truckloads destined for a single consignee (or unloading truckloads from a single shipper) is eliminated when an FSL container is used, whether or not that container is shortstopped or stuffed or stripped in connection with certain traditional warehousing practices. The ILA's effort to compensate for the loss of this work by obtaining stripping and stuffing work that is traditionally done by motor carrier employees and warehousemen, not longshoremen, is not valid work preservation but is instead unlawful under Section 8(e). The consideration to which the court of appeals attached preeminent importance—whether the Rules cause non-ILA employees to be deprived of work—is simply immaterial, because an agreement that attempts to compensate a bargaining unit in this way for work that has been eliminated by technological innovation is unlawful whether or not it deprives other employees of work. In *ILA I*, this Court, in suggesting that the Board might find that the Rules do not serve a valid work preservation objective because the longshoremen's work had been eliminated, did not intimate that the Board must also find that the Rules deprive other employees of work.

Finally, the court of appeals simply assumed that, in fact, the Rules have no effect on the employees of motor carriers engaged in shortstopping or of warehouses engaged in traditional warehousing practices. In making this assumption, however, the court of appeals failed to give the proper deference to the Board's determination that the longshoremen's work had been eliminated and to the finding of the ALJ, upheld by the Board, that the work the longshoremen were seeking to acquire was traditionally that of other employees. Pet. App. 57a-59a. Specifically, the court of appeals' assumption ignores the economic realities underlying the Board's determination. The court assumed that enforcement of the Rules would simply reestablish an initial, duplicative break-bulk handling by longshoremen and leave the inland work patterns of truckers and warehouses unaffected. But break-bulk handling is labor intensive and costly, and a second break-bulk handling creates an additional risk of lost or damaged goods. Any process requiring a second such handling therefore suffers a significant economic disadvantage; this is precisely why containerization grew in the first place. See *ILA I*, 447 U.S. at 494-495.

The more reasonable assumption, therefore, is not that the longshoremen will do duplicative work but that the industry will develop practices that avoid an unnecessary break-bulk handling. For example, longshoremen might perform the integrated task previously performed by truckers and warehouse employees, with facilities at the pier being modified to the extent necessary to permit this—in which event the longshoremen would have directly deprived the other employees of their work, contrary to the court of appeals' assumption.[12] Indeed, it is notable that—again contrary to the court of appeals' assumption that the Rules will simply bring about duplicative stripping and stuffing by the ILA—the Rules do not provide for longshoremen to restrip or restuff FSL containers that have been stripped or stuffed by other employees in violation of the Rules. Instead, the Rules are a prohibition—enforceable by the payment of liquidated

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[12] Alternatively, if it is possible—which it will not always be (see J.A. 117-118, 129, 206, 212-213)—cargo might be diverted to truck terminals and warehouses beyond the 50-mile limit covered by the Rules (see J.A. 32-33, 59-60, 101, 115-116, 131-132, 136-137), a step that would also deprive certain motor carriers and warehouse employees of work.

damages—against the delivery of containers to companies that permit employees to strip or stuff them in violation of the Rules. Thus the Rules directly seek to deprive other employees of their work.

CONCLUSION

The judgment of the court of appeals, insofar as it denied enforcement of the Board's order, should be reversed.

Respectfully submitted.

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